

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LING FISHER,

Plaintiff,

v.

PRIORITY MORTGAGE, INC., et al.,

Defendants.

CASE NO. C03-3585RSM

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

This matter is before the Court for consideration of defendant Washington Mutual's motion to dismiss for failure to cooperate in discovery and failure to prosecute (Dkt. #24). Although plaintiff has opposed the motion, the Court finds merit in defendant's arguments, and for the reasons set forth below now grants this motion.

FACTUAL BACKGROUND

This complaint, which was filed in 2003, arises out of a 1999 mortgage loan plaintiff Ling Fisher obtained from defendant Washington Mutual through a mortgage broker, defendant Priority Mortgage. Plaintiff alleges fraud, misrepresentation, violations of the Consumer Protection Act and Truth in Lending Act, and other violations. The action was stayed following the bankruptcy filing by defendant Priority Mortgage. After more than a year passed, plaintiff was directed to file a status report advising the Court of the status of the bankruptcy. Plaintiff, in response, advised the Court that the bankruptcy proceedings

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1 had been completed and that Priority Mortgage should be dismissed, but that she would maintain the case
2 against the remaining defendant, Washington Mutual. The Court then issued a standard order directing
3 the parties to confer and file a Joint Status Report on or before August 2, 2005. Under that Order, the
4 process which leads to creating the Joint Status Report is to be initiated by plaintiff.

5 When no Joint Status Report was filed by November 29, 2005, almost four months after it was
6 due, the Court ordered plaintiff to show cause why the action should not be dismissed for failure to
7 prosecute and failure to comply with the Court's orders.¹ Dkt. # 18. The Joint Status Report was
8 finally filed on December 8, 2005. The Court then issued a scheduling Order, setting among other dates,
9 a discovery cut-off date of July 10, 2006 and a trial date of November 6, 2006.

10 Apart from a notice of unavailability of counsel for a two-week period in the spring of 2006,
11 nothing further was filed by either party until plaintiff's counsel filed a notice of withdrawal on June 28,
12 2006. Dkt. # 23. This notice was stricken by the Court for counsel's failure to comply with the local
13 rules regarding appearance and withdrawal of attorneys. Dkt. # 28. Counsel did not subsequently file a
14 motion to withdraw as required and thus remains counsel of record.

15 On July 13, 2006, after the close of discovery, defendant Washington Mutual filed this motion to
16 dismiss, based in part on plaintiff's failure to appear for her noted deposition on three separate occasions.
17 As this motion was filed after plaintiff's counsel filed her ineffective notice of withdrawal, the Court re-
18 noted the motion to dismiss to August 25, 2006 so that plaintiff would have an opportunity to oppose it.
19 Plaintiff's opposition was timely filed, but fails to provide sufficient basis for denial of the motion.

20 ANALYSIS

21 Defendant has moved for dismissal for failure to cooperate with discovery, pursuant to F.R.Civ.P.
22 37(d), and failure to prosecute, pursuant to F.R.Civ.P. 41(b). Rule 37(d) provides, in relevant part, that
23 [i]f a party . . . fails (1) to appear before the officer who is to take the deposition, after being
24 served with a proper notice, . . . the court in which the action is pending on motion may
make such orders in regard to the failure as are just, and among others it may take any

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26 ¹This was the second time the Court had to issue such an order. The original Joint Status Report,
prior to the bankruptcy stay, was to be due January 20, 2004, and plaintiff failed to file anything in
27 response until the Court issued an Order to Show Cause on March 1, 2004. Dkt. # 7.

1 action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.
2 . . . In lieu of any order or in addition thereto, the court shall require the party failing to act
3 or the attorney advising that party or both to pay the reasonable expenses, including attorney's
fees, caused by the failure unless the court finds that the failure was substantially justified
or that other circumstances make an award of expenses unjust.

4 F.R.Civ.P. 37(d). Dismissal of the action is one of the sanctions specifically authorized under Rule
5 37(b)(2)C).

6 Rule 41(b) states, in relevant part,

7 [f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court,
8 a defendant may move for the dismissal of an action or of any claim against the defendant. Unless
the court in its order for dismissal otherwise specifies, a dismissal under this
subdivision . . . operates as an adjudication upon the merits.

9 F.R.Civ.P. 41(b).

10 Defendant states that after six written and numerous oral requests for a deposition date, plaintiff's
11 deposition was finally set on June 5, 2006. An hour before the starting time for the deposition,
12 defendant received notice from plaintiff's counsel that plaintiff was unlikely to appear. Defendant
13 rescheduled the deposition for June 15, 2006, and again sent notice to plaintiff. Counsel and the court
14 reporter waited for thirty minutes past the scheduled time, but plaintiff failed to appear or to contact
15 anyone to explain her failure. Plaintiff finally arrived at the deposition twenty minutes later, after
16 everyone had departed. The following day, defendant contacted plaintiff's counsel to re-schedule the
17 deposition once again. On June 26, when defendant had not heard back from plaintiff's counsel
18 regarding a suitable time for the deposition, defendant sent plaintiff a third deposition notice, setting the
19 deposition for July 10, the final day of discovery. On June 28, counsel for plaintiff attempted to
20 withdraw from the case, but as noted above her notice was stricken by the Court. However, on June 29,
21 believing that plaintiff was now proceeding *pro se*, defendant advised plaintiff by mail to her address of
22 record that it would move for dismissal of the case if she failed to appear for this third deposition. On
23 July 10, both defense counsel and plaintiff's counsel attended the scheduled deposition, but plaintiff never
24 appeared, despite the advice she had received regarding the consequences.

25 In opposing the motion to dismiss, plaintiff's counsel states that her office may be responsible for
26 plaintiff's failure to attend the first deposition, because her legal assistant was not able to contact plaintiff
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1 to confirm the deposition. Counsel then asserts that plaintiff was late to the second deposition because of
2 difficulty finding a parking space, and that she “forgot” about the third one. Counsel also states that
3 plaintiff has “indicated willingness to present herself for deposition in the future.” Opposition to Motion
4 to Dismiss, p. 8. Notably absent from this opposition, however, is any affidavit or declaration asserting
5 these facts and intentions from plaintiff herself. Instead, counsel has repeatedly referred to her difficulties
6 in contacting plaintiff and getting responses from her. Indeed, it was counsel’s inability to communicate
7 with her client, together with “differing viewpoints on the case”, that caused counsel to attempt to
8 withdraw from representation. *Id.* at p. 5.

9 Plaintiff’s failure to attend her three noted depositions is not the only basis upon which defendant
10 moves for dismissal. Defendant asserts that plaintiff also failed to meaningfully participate in discovery.
11 Her responses to written interrogatories were more than four months late, and in many cases failed to
12 provide any factual basis for her claims against Washington Mutual. Instead, she repeatedly referred back
13 to the factual statements in the complaint, most of which were directed toward defendant Priority
14 Mortgage rather than Washington Mutual. She also failed to identify certain witnesses who had
15 knowledge of the facts regarding her loan, such as her own daughter who was present at the document
16 signing.

17 In opposing dismissal, plaintiff does not dispute any of these assertions. Indeed, counsel’s
18 explanation only reinforces the conclusion that plaintiff has failed to prosecute her action. Counsel states
19 that

20 [t]he discovery requests and proposed responses were sent to Ms. Fisher in January 2006
21 and counsel for both parties agreed that timeframe was acceptable. Counsel for Ms. Fisher
22 spoke with her client after she received the documents in the mail and was assured that Ms. Fisher
would provide the responses. However, they were not provided during the remainder
of January 2006 or February 2006.

23 Counsel for Ms. Fisher, a solo practitioner, began a trial in King County Superior Court on March
24 7, 2006 and remained in trial, with occasional breaks, from March 7, 2006 through
March 23, 2006, when she left for a pre-planned and prepaid vacation until April 9, 2006.
25 . . . Meanwhile, upon her return from vacation . . . counsel for Ms. Fisher resumed her
efforts to obtain discovery responses from Ms. Fisher. After getting Ms. Fisher into her
26 office to work on the discovery responses in person, [counsel] sent out the final responses
for approval and verification by Ms. Fisher. There was again a delay in receiving the signed
27 responses from Ms. Fisher. Nevertheless, in order to avoid further delays to counsel for

1 defendant WAMU, counsel for Ms. Fisher provided the final draft version by e-mail. **As of**
2 **the date of this filing, counsel for Ms. Fisher has not received signed verification of the**
3 **discovery responses from her client.**

4 Opposition to Motion to Dismiss, p. 2-3 (emphasis added).

5 The record here demonstrates that plaintiff has not only failed to attend her deposition on three
6 separate occasions, she has otherwise failed to cooperate with discovery, and has missed numerous
7 deadlines imposed by both Court order and by the Federal Rules of Civil Procedure. She has failed to
8 communicate with counsel or to assist her in prosecuting her claims, to the point that counsel felt it
9 necessary to withdraw from representation. Plaintiff's conduct has impeded the Court's ability to manage
10 its docket, and has prejudiced defendant's efforts to present a defense. Plaintiff has provided no
11 assurance to the Court and to defendant that this behavior will not continue. Her complaint is thus
12 subject to dismissal under both Rule 37(d) and 41(b).

13 Accordingly, defendant Washington Mutual's motion to dismiss is GRANTED. As this is the
14 only remaining defendant, the action is hereby DISMISSED. The Clerk shall enter judgment in favor of
15 defendant Washington Mutual in this matter. As defendant has not requested expenses and attorney's
16 fees as a Rule 37(d) sanction, no attorney's fees shall be ordered.

17 DATED this 8th day of September, 2006.

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21 RICARDO S. MARTINEZ
22 UNITED STATES DISTRICT JUDGE
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